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IN THE

Supreme Court of the United States

October Term, 1956

No. 6

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIM SPECTOR, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALEY CONNELLY, and FRANK CARLSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

No. 20

STEPHEN MESAROSH, also known as STEVE NELSON, BENJAMIN L. CAREATHERS, IRVING WEISSMAN, JAMES H. DOLSEN, and WILLIAM ALBERTSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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STEPHEN MESAROSH, also known as STEVE NELSON, BENJAMIN L. CAREATHERS, IRVING WEISSMAN, JAMES H. DOLSEN, and WILLIAM ALBERTSON,

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UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of Amicus

The American Civil Liberties Union, appearing herein with the consent of all the parties filed with the Clerk of this Court, is a nationwide non-partisan organization devoted solely to the protection and advancement of the Constitutional rights fundamental to the democratic way of life. It has no other program, either political, economic, social, or philosophical.

Amicus' primary concern with the instant cases is that this Court's validation of the convictions here involved would cause a contraction in freedom to exchange political opinions in America, particularly on international issues, and a loss in the cognate freedom to associate for the purpose of political expression. The instant convictions not only would establish a precedent lessening the protection of the First Amendment guarantee for all Americans, but would, here and now, spread a restraint over the rights of expression and association of Americans generally.

The cases now before this Court have, to amicus, an enhanced importance because it believes there has been a widespread disregard of First Amendment principles in the past few years, which has for one reason or another escaped judicial scrutiny. Judicial guidance back to First Amendment principles by invalidation of the instant convictions would be most opportune and salutary; it would help revive the traditions and patterns of free thought, free expression, and free association which in day-by-day practice are being transformed and corrupted from their constitutionally-intended design.

Amicus recognizes that the Communist Party has a dual nature, engaging publicly in the forms of expression and association usual to political parties and organizations, but also engaging covertly in anti-democratic methods in

aid of the aims of Soviet Russia. Amicus is concerned solely with protection of the rights of individual Communist Party members in the first role, because of the effect of restraints in this area on principles and practices affecting freedom of expression and association for all Americans.

Statement of the Case [1]

This brief is submitted in support of petitioners herein on two issues: first, whether proof of advocacy and teaching of the doctrines of Marxism-Leninism by the Communist Party, together with proof as to each of the petitioners of membership and the holding of office in the Party, and participation in *lawful* activities therein, is sufficient to sustain a conviction for conspiracy to violate the provisions of the "Smith Act," 18 U. S. C., §§ 371, 2385. Second, whether in petitioners' cases there existed a "clear and present danger" of an attempt to overthrow the government of the United States by force and violence.

Under the rule of *Dennis* v. *United States*, 341 U. S. 494, we believe that the convictions below can be sustained only upon proof beyond a reasonable doubt that: (1) each of the accused knowingly and wilfully conspired to advocate and teach the overthrow of the government of the United States by force and violence, and to organize as the Communist Party of the United States, a society, group or assembly of persons who so teach and advocate (*id.*, at pp. 496-7); (2) each of the accused conspired as aforesaid with the specific intent to overthrow the government of the

[1] The facts relied on by the Amicus are set forth in Appendix C of the Petition for Certiorari submitted in *Yates, et al.* v. *United States*, No. 308, October Term, 1955, and Appendix B of the Petition for Certiorari in *Mesorosh, et al.* v. *United States*, No. 566, October Term, 1955.

United States by force and violence as speedily as circumstances would permit (*id.*, at pp. 499-500, 515-16); (3) each of the accused so unlawfully conspired with the intent that such teaching and advocacy be of a rule or principle of action, and by language reasonably and ordinarily calculated to incite persons to such action (id., at pp. 511-13); and that (4) the aforesaid conspiracy, accompanied by such specific unlawful intents involving defendants proven to have the "power to bring about the evil," coupled with "the inflammable nature of world conditions," justifies the finding of "clear and present danger," as defined by this Court, of an attempt to overthrow the government of the United States by force and violence (*id.*, at pp. 502-11).

In this brief, we do not intend to deal with the legal issues ably and forcibly presented in the briefs of petitioners and the Government. Rather, we intend to demonstrate that the conviction of petitioners on the evidence adduced against them, when measured against the yardstick of history, cannot stand, and in this connection we note that "A page of [it] is worth a volume of logic." Holmes, J., in *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349. Moreover, an examination of the political institutions of this nation demonstrates a factual condition which is inconsistent with a finding by this Court of a "clear and present danger"[2] of an attempt to overthrow the government of the United States by force and violence.

In this context, then, we urge that the judgments below be reversed.

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[2] When we speak of "clear and present danger," we use the term as defined in *Dennis* v. *United States*, 341 U. S. 494, 502-11.

I

Proof of advocacy and teaching of the doctrines of Marxism-Leninism by the Communist Party, together with proof as to each of the petitioners of membership and the holding of office in the Party and participation in lawful activities therein, is insufficient to sustain the convictions below.

In some criminal cases the only intent which must be proved is the intent to commit the prohibited act; in most such cases an intent to violate the law or reckless disregard of the law is also required. In the present cases, however, the intent which must be established is not merely one to advocate forceful overthrow of the United States Government and to organize to that end in deliberate violation of the law or in wilful disregard thereof. There is a separate and additional element of intent which must be proved beyond a reasonable doubt—the intent to actually overthrow the Government of the United States by force and violence as speedily as circumstances will permit. This was clearly stated in *Dennis* v. *United States*, 341 U. S. 494:

> "We hold that the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence." *Id.*, at p. 499.

In recognizing that the *Dennis* case involved the right of free speech, this Court was not content with pointing out that intent is an essential element of the offense. It went on to say, "Where there is doubt as to the intent of defendants * * * this court will review the convictions with the scrupulous care demanded by our Constitution." *Id.*, at p. 516. Thus, if a conviction for conspiracy to *advocate* is to stand consistently with the First Amendment, we think proof of intent must be unequivocal, convincing and clear. See, *Baumgartner* v. *United States*, 322 U. S. 665, 670-671; *Hartzel* v. *United States*, 322 U. S. 680, 687.

The historical record supports the view of John Lord O'Brian: "The chief difficulty * * * has naturally been the question of what *quantum of evidence* would, as a matter of law, justify submitting to the jury the question of unlawful intent * * *." *Civil Liberty in War Time,* 42 Rep. N. Y. Bar Assn. 275, 309 (1919). This difficulty is made even more difficult in "conspiracy" cases because of the general rule that acts and declarations of one conspirator, made in furtherance of the conspiracy, are admissible against all fellow co-conspirators. *Krulewitch* v. *United States,* 336 U. S. 440. But while a hundred officials of the Communist Party may be hardened revolutionaries, the hundred and first may be a political deviationist, a backslider, or even an FBI informer. This Court has acknowledged that "men in adhering to a political party or organization notoriously do not subscribe unqualifiedly to all its platforms or asserted principles," *Schneiderman* v. *United States,* 320 U. S. 118, 136, and that even where the charge is criminal conspiracy, "guilt * * * is individual and personal." *Kotteakos* v. *United States,* 328 U. S. 750, 772. See also: *Stack* v. *Boyle,* 342 U. S. 1, 9.

The reasons requiring that the necessary specific intent be brought home *personally* and individually to each co-defendant in these cases by unequivocal, clear and convincing evidence stem from experience at least 163 years old. And if we are not to learn from the acknowledged errors of our forebears, free discussion of the problems of society—a cardinal principle of our democracy—may in future become only an historic relic.

A. Some Pages from the Historical Record

In 1793, Thomas Muir was convicted in the High Court of Justiciary at Edinburgh, Scotland, under an indictment which charged him with making speeches criticizing the rotten borough system and advocating the extension of the elective franchise in which he represented the govern-

ment as oppressive and tyrannical, and the legislative body of the State as venal and corrupt. The indictment went on further to allege (and this was the gravamen of the charge) that Muir advocated, exhorted and advised people to read the works of Thomas Paine and recited a long series of polemical quotations from the works of Paine.[3] In his charge to the jury, the Presiding Judge, Lord Braxfield, stated:

> "The British Constitution is the best in the world; for the truth of this, gentlemen, I need only appeal to your own feelings. Is not every man secure in his life, liberty and property? * * * Does not every man enjoy unmolested the fruits of his industry? And does not every man sit safely under his own vine? * * * I leave it for you to judge, whether it was perfectly innocent or not in Mr. Muir, at such a time, to go about among ignorant country people, and among the lower classes of the people, making them leave off their work, and inducing them to believe that a reform was absolutely necessary to preserve their safety and their liberty, which, had it not been for him, they never would have suspected to have been in danger. * * * Mr. Muir's plan of discouraging revolt and all sorts of tumult was certainly political; for until everything was ripe for a general insurrection any tumult or disorder could only tend, as he himself said, to ruin his cause; he was, in the meantime, however, *evidently poisoning the minds of the common people and preparing them for rebellion.*" (Emphasis supplied.)[4]

American sentiment about Muir's conviction is best evidenced by the American expedition of 1796 to rescue Muir from New South Wales, where he had been transported under sentence by Braxfield for fourteen years.[5]

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[3] See May, *Constitutional History*, II, 38-41.

[4] Hale, *Thirty Who Were Tried* (London, 1955), 61-62.

[5] Chafee, *Free Speech in the United States*, 26 (1948).

In 1798, Representative Matthew Lyon of Vermont was convicted of sedition under the "Alien and Sedition Acts of 1798".[6] The indictment charged Lyon with wickedly and maliciously contriving to defame the Government and the President "with force and arms" with the intent and design to bring in contempt and disrepute and to excite the hatred of the people of the United States against the President and to stir up sedition in the United States. The indictment further charged him with publishing a letter which expressed wonder that a speech by President Adams before the Senate had not caused "an order to send him [Adams] to a madhouse. Instead of this, the Senate have echoed the speech with more servility than ever George III experienced from either House of Parliament." *United States v. Lyon,* Wharton, *St. Tr.*, 333, 334.

At Lyon's trial, prosecution witnesses testified that he used the publications complained of for political purposes, employing language "highly disrespectful to the administration." Another witness testified that Lyon's reading of the letter at public meetings in Vermont had created a commotion, and one of them had heard a person say at a political rally that there must be a revolution. See, Smith, *Freedom's Fetters*, 233 (1956).

The presiding judge, Associate Justice Patterson of the United States Supreme Court, charged the jury that they had but two issues to decide in the case: (1) Had Lyon published the writings listed in the indictment? (2) Had he done so seditiously, that is, with "bad intent"? Since Lyon admitted the publications, the first question was undisputed. "As to the second point," the Judge added, "You will have to consider whether language such as that here complained of could have been uttered with any other intent than that of making odious or contemptible the

[6] Act of June 25, 1798, 1 Stat. 570; Act of July 14, 1798, 1 Stat. 596.

President and the Government, and bringing them both into disrepute. If you find such is the case, the offense is made out, and you must render a verdict of guilty." Lyon was found guilty, sentenced to four months in jail, and fined $1,000. See, Smith, *Freedom's Fetters,* 234-235 (1956). After Lyon's conviction, Thomas Jefferson wrote, "I know not which mortifies me most, that I should fear to write what I think or my country bear such a state of things. Yet Lyon's judges, and a jury of all nations, are objects of national fear." [7]

In 1800, Thomas Cooper was charged with seditious libel under the Alien and Sedition Acts for stating, in 1799, that President Adams in 1797 "was but in the infancy of political mistake," and for other statements criticizing the conduct of the Adams administration. *United States* v. *Cooper,* Wharton, *St. Tr.,* 663. The case was tried before Associate Justice Samuel Chase of the United States Supreme Court, who instructed the jury that the government had to prove two facts: first, that the defendant wrote the publications in question, and, second, that he had published them with "bad intent."

According to the prosecution, "Government should not encourage the idea that they will not prosecute such atrocious conduct, for if this conduct should be allowed to pass over, the peace of the country would be in danger. Error leads to discontent, discontent to a fancied idea of oppression, and that to insurrection." Smith, *Freedom's Fetters,* 319-320 (1956). The prosecution argued that, since Cooper's words intended to undermine public confidence in the President, his intent must have been bad, and that it was the duty of the jury to show that this kind of attack on the Government could not be made with impunity. *Id.,* at p. 330.

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[7] Jefferson to John Taylor, November 26, 1798. *Jefferson's Writings* (Bergh, ed.), X, 63.

In the course of his charge to the jury, Judge Chase stated that "bad intent" had been proved, and the fact that Cooper had shown his publication to a prosecution witness and jokingly admitted that was his, was "outrageous," which action, said Judge Chase, "intended to dare and defy the Government, and to provoke them, and his subsequent conduct satisfied my mind that such was his disposition, for he justified the publication in all its parts and declared it to be founded in truth." *Id.*, at pp. 325-326. Cooper was found guilty, sentenced to six months in prison and fined $400.

In 1799, Jedediah Peck, a judge of the New York Court of Common Pleas and a member of the New York State Assembly, was indicted for publishing a petition to Congress advocating the repeal of the Alien and Sedition Acts. Although the case came on for trial before the United States District Court for the Southern District of New York during the April Term of the Circuit Court in 1800, the trial was postponed because the witnesses were not present, and thereafter prosecution against Peck was not pressed. Peck's arrest and indictment deeply stirred the people of New York and, perhaps more than anything else, served to destroy the Federalist Party in New York in the elections of 1800-1801. See, Smith, *Freedom's Fetters*, 390-396 (1956).[8]

Subsequent to Jefferson's inauguration in 1801, the Alien and Sedition Acts expired, all persons convicted thereunder were pardoned and Congress eventually refunded the fines.[9] In his First Inaugural Address, without specifically referring to the Alien and Sedition Act prosecutions, the newly elected President of the United States said:

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[8] But cf. *Baltzer* v. *United States*, 248 U. S. 593; compare the evidence adduced against petitioner Steinberg which establishes that he protested the jailing of co-conspirator Dennis.

[9] Chafee, *Free Speech in the United States*, 27 (1948).

"If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it. I know, indeed, that some honest men fear that a republican government can not be strong; that this Government is not strong enough; but would the honest patriot, in the full tide of successful experiment, abandon a government which has so far kept us free and firm on the theoretic and visionary fear that this Government, the world's best hope, may by possibility want energy to preserve itself? I trust not. I believe this, on the contrary, the strongest Government on earth. I believe it the only one where every man, at the call of the law, would fly to the standard of the law, and would meet invasions of the public order as his own personal concern. Sometimes it is said that man can not be trusted with the government of himself. Can he, then, be trusted with the government of others? Or have we found angels in the form of kings to govern him? Let history answer this question." Richardson, *Messages*, I, 322.

In 1918, five persons were convicted in the United States District Court for the Southern District of New York for conspiring to violate the Espionage Act because they agitated against United States intervention in Russia in the summer of 1918, by distributing a leaflet which contained the following call to arms: "Workers, our reply to the barbaric intervention has to be a general strike! * * * Workers, up to fight." See, *Abrams* v. *United States*, 250 U. S. 616. On the evidence adduced against the defendants, Professor Chafee comments: "It is hard to see how the jury could have convicted * * * if they had been instructed that a specific intent to hinder the war with Germany was necessary, but the judge * * * gave no explanation of the importance of this specific intent. He did not distinguish it from a general intention to publish the leaflets. Instead, the judge charged, 'People who have circulars to distribute, and they intend no wrong, go up and down the streets

circulating them. During the trial, although the defendants' counsel reminded him that Russian meetings in New York had been broken up, Judge Clayton said he would leave it to the jury whether throwing pamphlets out of windows squared with good, honest intention, and whether being anarchists and wanting to break up all government squared with honesty and sincerity of purpose. Soon afterward he stated

> 'If it were a case where the defendant was indicted for homicide, and he was charged with having taken a pistol and put it to the head of another man and fired the pistol and killed the man, you might say that he did not intend to do that.
>
> But I would have very little respect for a jury that would come in with a verdict that he didn't have any intent.'

"Plainly these rulings of Judge Clayton ignored the specific intent to oppose or hinder the war with Germany, as demanded by the statute; he authorized the jury to convict the defendants for intention to publish the pamphlets and a generally bad mind." *Free Speech in the United States,* 125-126 (1948).[10]

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[10] Some of the evidence on "intent" upon which the Supreme Court sustained the convictions of all five defendants was contained in writings of two of the defendants found in their possession. Excerpts from these writings indicated that the defendants planned to keep Allied armies busy at home so that there would be no Allied armies to spare for intervention in Russia. Professor Chafee concludes that "the defendants entered prison with the prospect of staying fifteen or twenty years largely because of scattered passages in manuscripts for which they were not indicted, and which they had neither printed or distributed. There is not the slightest testimony that Lipman [one of the conspirators] ever showed them to anybody after dashing them off. Moreover, the typewritten sheets were plainly a first draft for the English leaflet, and in revision all Justice Clarke's objectionable passages vanished. 'It is going pretty far to condemn an author for what he leaves out.'" *Id.*, at pp. 124-125. For an excellent description of World War I prosecutions under the Espionage Act, see, Chafee, *supra,* Chap. 2-4.

In *State* v. *Boloff*, 138 Ore. 568, the defendant was convicted of violation of the Oregon Syndicalism Act on the ground that he had been a member of the Communist Party for eight years, during which time he had paid substantial dues, had attended meetings where the red flag was on display and where he could see quantities of literature profusely illustrated with pictures of men engaged in violence. One of the prosecution witnesses testified that he believed that Boloff had attended a meeting where one of the speakers advocated the use of violence. Professor Chafee notes that;

> "The evidence against him consisted mainly of a large amount of Communist literature, much of it carried through the mail as second-class matter, and of testimony about what had been said at Communist meetings and conventions without proof that the statements of the most rabid speaker were ratified by the organization. The chief witness for the prosecution was a police officer who had joined the Portland Communist local a few months before to learn its nature, and had risen rapidly to become secretary and its delegate to two regional conventions. He and an immigration official gave expert testimony of the purposes of the Communist Party, and stated that it aimed 'to bring about an armed revolution at the very first opportunity.' On this testimony Boloff was convicted and given the maximum imprisonment of ten years in the state penitentiary, but was mercifully exempted from paying a fine. • • • Fortunately Boloff was released and the entire Criminal Syndicalism Act was repealed • • •." *Id.*, at pp. 479-480.[11]

B. Appraisal and Summary

The evidence against petitioners herein consists mostly of long, voluminous and inflammatory quotations from

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[11] Compare the unanimous ruling of this Court reversing the convictions of the President and Treasurer of the Philadelphia *Tageblatt* in *Schaefer* v. *United States*, 251 U. S. 468.

Marx, Engels and their more recent disciples. We think it more probable, so far as the respective juries were concerned, that the real defendants in these cases were not petitioners, but Lenin, Stalin, and others, neither indicted nor convicted. In connection with the World War I Espionage Act prosecutions, Professor Chafee notes that "far more discretion should have been exercised in the admission of prior utterances, because of the danger that the jury would convict the defendant as an undesirable citizen who, taken all in all, ought to be shut up." *Free Speech in the United States,* 78 (1948). Indeed, eighty percent of the testimony in the famous Chicago Anarchist case (*People* v. *Spies, et al.,* 122 Ill. 1) had to do with the doctrines and philosophy of anarchism. Zeisler, *"Reminiscences of the Anarchist Case,"* 21 Ill. L. Rev. 224, 244 (1926). In that case, four "conspirators" were hanged and another committed suicide. Governor Altgeld's "conclusion was that the eight defendants had been convicted not because they had been proved guilty of murder, but because they were anarchists." *Id.,* at p. 250. In the cases *at bar* it is not unlikely that petitioners were convicted because they were Communists, and not because they were proven guilty of teaching and advocating the overthrow of the government of the United States by force and violence.

In more recent times the technique of proving the required specific criminal "intent" of a defendant by imputing to him the "reprehensible" objectives proven against the organization of which he is an officer or a member, has been repeatedly rejected by this Court.[12] If "guilt by association" ranks low on the scale of judicial values, *"inferential" guilt by such association* commands even less respect. Chief Justice Hughes posed the issue clearly:

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[12] See, *e. g., Herndon* v. *Lowry,* 301 U. S. 242, 263; *Schneiderman* v. *United States,* 320 U. S. 118, 136; *Baumgartner* v. *United States,* 322 U. S. 665, 671; *Knauer* v. *United States,* 328 U. S. 654, 658; *Hartzel* v. *United States,* 322 U. S. 680, 687; *Klapprott* v. *United States,* 335 U. S. 601, 612.

> "The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held, but as to its purpose; not as to the relationship of the speakers, but whether their utterances transcend the bounds of freedom of speech which the Constitution protects." *De Jonge* v. *Oregon*, 299 U. S. 353, 365.

On this ground alone, we urge that the convictions below be reversed.

II

The strength of American institutions obviates a finding of any "clear and present danger" of an attempt to overthrow the government by force and violence.

In order to intelligently evaluate the likelihood of an attempt, successful or unsuccessful, at overthrowing our government by force or violence, it is essential to understand the comparative strengths of the organization or group suspected of wanting to subvert the established American political institutions, and the institutions themselves. Although statistics are undeniably important, they are ultimately useful only in relation to the historical and contemporaneous background of the institutions concerned —the development, effectiveness and vitality of their functions—which are themselves viewed within the larger framework of the nation's political, economic, social and moral health.

A. Strength and Influence of the Communist Party in the United States

Since the object of our inquiry here is both the nature and scope of Communist threats to the security of the United States, and the capacity of the Communist Party in the United States to carry out such threats, it is logical to first

examine their numerical and real strength. According to J. Edgar Hoover, Director of the Federal Bureau of Investigation, Communist Party membership in the United States since the end of World War II has been as follows:

1947	74,000	1953	24,796
1950	55,000	1955	22,663
1951	43,217	1956	20,000 [13]
1952	31,608		

Not only has there been no Communist ticket in national elections since 1940, but, in addition, no past or present member of Congress or of any state legislature has ever been elected on the Communist Party ticket (the same holds true, at the present time, of municipal offices, although there have been isolated cases in the past of Communists elected to city offices.[14] If the appeal of the Communist Party to the electorate has been so insignificant, it would seem highly unreasonable to believe that it could win wider popular support for an illegal program involving recourse to force and violence.[15]

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[13] Figures for 1947, 1951 and 1952 are taken from *U. S. News and World Report*, April 11, 1952, p. 35, quoting J. Edgar Hoover. Figures for 1950 are from *New York Times*, May 3, 1950, quoting from speech of J. Edgar Hoover. Figures for 1953 are from testimony of J. Edgar Hoover in Hearings before House Subcommittee on Appropriations for the Departments of State, Justice and Commerce (83rd Cong., 1st Sess.), Feb. 25, 1953, at p. 137. Figures for 1955 are from *The Communist Party of the United States of America*, report of the Senate Internal Security Subcommittee of the Judiciary Committee (84th Cong., 1st Sess., Dec. 21, 1955) at p. 34, based on F. B. I. report. Figures for 1956 are from interview with J. Edgar Hoover, reported in *New Haven Register*, Feb. 17, 1956.

[14] See Note, "*The Legal Status of the Communist Party*," 34 Va. L. Rev. 450, 455 n. 44 (1948).

[15] In a message to Congress dated August 8, 1950, President Truman said: "In the United States, the Communist Party has never received more than a minute portion of the national vote. The good sense of the American people, and their faith in democracy, have utterly rejected the false political appeal of Communism." *New York Times*, August 9, 1950.

With respect to the judicial branch of both federal and state governments since 1950-1951, there would appear to be no suggestions from serious, responsible quarters that a member of the Communist Party has ever held a significant position within the judiciary. By 1952, a series of administrative programs specifically designed to remove members of the Communist Party covered the entire executive branch of the Federal Government, including the armed forces,[16] and resulted in President Eisenhower's statement at a press conference on December 2, 1953, that "The Republicans • • • ought to expect and receive commendation from the voters for their efficiency in eliminating Communists from Government."[17] Within several weeks, Attorney General Herbert Brownell, Jr., "said • • • that he thought persons suspected of communistic tendencies 'are all out of Government now.'"[18]

The majority of the states have also adopted loyalty oaths or other measures which have the effect of disqualifying members of the Communist Party from public employment.[19] In New York, perhaps ten or fifteen state employees resigned or were dismissed in 1953 following their refusal to answer questions of the House Committee on Un-American Activities regarding Communist activities, and in a few metropolitan areas, particularly in New York, Detroit and Los Angeles, there have been removals of municipal employees pursuant to state laws or local regulations; a study of the persons removed and the security programs in effect suggests that few, if any, Communists held or now hold positions of influence in state and local administrations.[20]

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[16] See, *Internal Security Manual* (Revised) Senate Doc. No. 40, 84th Cong., 1st Sess., 244-287 (1955).

[17] See, *New York Times*, December 3, 1953, p. 2.

[18] See, *New York Times*, December 14, 1953, p. 1.

[19] See, Gellhorn, *The States and Subversion* (1952).

[20] See, *Digest of the Public Record of Communism in the United States*, 241-245, 472-487 (1955).

On the basis of the available data, at no time has the Communist Party or its members occupied any position of power in industry, exclusive of labor organizations. Since labor unions now require affidavits of non-membership in the Communist Party and, in many cases, have repudiated Communist influence and support, the strength of the Communist Party in labor organizations has greatly diminished since 1950.[21] The point was made by FBI Director J. Edgar Hoover in an interview published in *U. S. News and World Report,* March 30, 1951, p. 34:

> "Q. What is the activity of Communists inside labor unions, according to the information you have? A. We, of course, do not investigate labor unions, nor do we concern ourselves with employer-employee relationships. We have, however, investigated innumerable instances of Communist infiltration into labor unions. The Communists today do not have the power they once had, nor do they have the influence they once had in labor unions. The great majority of labor leaders and organizations are alert to Communist infiltration.
>
> Q. They have done a good job in cleaning them out? A. They've done an excellent job.
>
> Q. And the labor unions and their leaders have co-operated to the fullest extent with the FBI? A. That's right, in the great majority of instances."

The communications industries, specifically the mass media of the press, radio, television and motion pictures, have been extensively investigated by public and private groups both. On the basis of published records, informed opinion holds that the Communist Party had, prior to 1950, several hundred members among professional employees

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[21] See, *e. g., American Communications Assn.* v. *Douds,* 339 U. S. 382; *Communist Domination of Certain Unions,* Senate Doc. No. 89, 82d Cong., 1st Sess. (1951); Taft, *The Structure and Government of Labor Unions,* 30-32 (1954); *"Monthly Labor Review,"* U. S. Dept. of Labor, B. L. S., October, 1954.

of these media.[22] As a result of repressive measures beginning around that date, however, it is unlikely that the employment of Communist Party members in these industries since 1950 would reach even that figure. Whatever the numbers, no substantial evidence has been adduced to show that these persons have been able, since 1950-1951, if such was their purpose, to influence the output of the media on which almost the entire population of the United States relies for information and entertainment, either to advocate the overthrow of the government by force and violence, or for any other identifiable Communist purpose.[23]

With respect to religious institutions, no charges of Communist influence have ever been made as to the Catholic and Jewish clergy; although there have been a few charges, from dubious sources, of extensive Communist influence among certain members of the Protestant clergy,[24] there is no record after 1952 of any active clergyman having been convincingly identified as a member of the Communist Party.

Although one must be wary of drawing conclusions about Communists holding positions of power in American educational institutions (a large number of teachers called to testify before Congressional committees, for example, invoked the privilege against self-incrimination), some statistics are available, and these indicate that the highest number of members of the Communist Party in educational circles, in the 1940's, was about 1500 throughout the United

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[22] Annual Report of House Committee on Un-American Activities, for the year 1951, February 17, 1952, p. 9.

[23] See, *e. g.*, Jones, "*Communism and the Movies, A Study of Film Content*," in Cogley, "*Report on Blacklisting*," Vol. I, 196-304 (1956).

[24] 99 Cong. Rec. 2024; Annual Report of House Committee on Un-American Activities for the year 1953, February 6, 1954, p. 97.

States, of whom 750 to 1,000 were in New York City.[25] In view of the shrinkage of Party membership generally, this figure, even if correct, would expectably be much reduced for the period since 1950. School authorities, under a variety of statutory and administrative powers, have been diligent in removing suspected Communist teachers, and, in addition to many state statutes prescribing loyalty oaths and other tests for public employees, a number of states have special requirements for teachers that would have the effect of legally barring members of the Communist Party, thus practically eliminating the influence of the Communist Party in educational institutions.[26]

Without enumerating all the other professions, the influence of the Communist Party in them would appear to be almost non-existent. In one of them, however—the legal profession—the issue has been raised, and it should be observed that there have been very few disbarment proceedings in which Communist Party membership is an issue, and that the dominant professional association, the American Bar Association (as well as a large number of states) will not admit members of the Communist Party.[27]

With respect to the Communist position in the Negro community, the House Committee on Un-American Activities in its report, "The American Negro in the Communist Party," dated December 22, 1954, stated:

> "The committee can only conclude that the vast majority of Americans of the Negro race have con-

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[25] See, Testimony of Dr. Bella V. Dodd, former member of the National Committee of the Communist Party, *Hearings, Internal Security Subcommittee, Senate Committee on the Judiciary,* September 8, 1952, p. 13.

[26] See, *e. g., Adler* v. *Board of Education,* 342 U. S. 485; *Adler* v. *Wilson,* 282 App. Div. 418; MacIver, *Academic Freedom in our Time,* Chap. XI (1955).

[27] See, Brown and Fasset, *"Loyalty Tests for Admission to the Bar,"* 20 Univ. of Chic. L. Rev. 480 (1953).

sistently resisted the blandishments and treacherous promises offered them by the Communist conspirators. The committee hopes that this detailed exposure of the true Communist aims and tactics in relation to the Negro people will serve even further to reduce the extremely limited and temporary Negro support which the Communists have obtained by subterfuge."

Affirmatively, the evidence would tend to support the opinion that the strength of the Communist Party has been so slight since 1950 that it could not be supposed that an attempt to overthrow the government of the United States by force and violence would be feasible in the foreseeable future, or that the Party could recruit any sizeable number of its sympathizers to aid it in the commission of illegal acts outside the framework of our existing democratic institutions.

B. The Strength of American Political Institutions

In order to effectively estimate the real, as opposed to the theoretical, potency of the Communist Party as a force to be reckoned with, we have now to consider the political and legal institutions, as well as the social and spiritual values, which it purportedly menaces.

On authoritative opinion, the conditions existing in this country since 1950 would preclude almost automatically even the contemplation of a resort to violence, always excepting a lunatic fringe. For example, on April 25, 1950, the *New York Times* editorialized: "Mr. Truman was merely stating the obvious when he said that the 'internal security of the United States is not seriously threatened by the Communists in this country' but the reminder is worth while * * *."[28] American political institutions have so well and so consistently demonstrated their effectiveness

[28] As to the "lunatic fringe," see, *United States* v. *Lebron* (2 Cir.), 222 F. 2d 531.

in meeting ordinary needs, as well as withstanding the tremendous impact of two world wars, a devastating depression, and the continuing challenge of world-wide unrest, that their stability and permanence would seem to be virtually unassailable.[29] When one considers the demonstrated and verified strength of the Communist Party in the United States, as discussed above, there remains little possibility that an attempt at overthrowing the government by force and violence, in defiance of these established traditions and institutions, would have any chance of success, or, indeed, receive serious consideration from anyone at all familiar with the deep roots of our governmental institutions.[30] It may be noted that, in comparison with other periods in our history, there are relatively few protest groups in the United States; those who do have grievances show no inclination to look elsewhere than our political and legal institutions for the redress of their grievances.[31] Since no politically conscious and numerically significant segment of the population is denied access to political or legal means for the correction of injustice, the objective basis for advocacy of force is removed.[32]

It is also apparent from even a superficial examination that there is no similarity between the political and social conditions existing in the United States since 1950 and those in effect in Russia prior to 1917, Germany before 1933, or in China before the Chinese Communists came to power.[33]

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[29] Brogan, *Politics in America*, 2 (1954); Commager, *The American Mind*, 410 (1950).

[30] Almond, *The Appeals of Communism*, 207 (1954); Allen, *"The Unsystematic American System,"* Harper's Magazine, June, 1952, p. 24.

[31] O'Brian, *National Security and Individual Freedom*, 73 (1955).

[32] Cf. Chafee, *The Free and the Brave*, 9 (1950).

[33] *Hearings on United States Foreign Policy for a Post-War Recovery Program*, House Committee on Foreign Affairs, 80th Cong., February, 1948, Testimony of Wm. C. Bullitt, p. 1898, ff. and of Spencer Kennard, p. 1928 ff.

It is a poltical truism that revolutions, or the resort to force and violence, are not attempted in countries where the political institutions operate to satisfy the needs of most of the people.[34] So long as opposition groups believe, no matter how slight the possibility, that they may persuade others to their programs, they are unlikely to have recourse to methods which could only result in their own suppression.[35] And it is the very fact that the United States has a tradition not only of tolerating dissent, but of recognizing it, even where it is not especially welcome, as a potentially creative force, that is one of our principal safeguards. For "No great nation ever succumbed to the pressure of competing ideologies or forces unless it first weakened itself by self-inflicted wounds * * *." Keyserling, *Saving American Capitalism*, 94 (1948).

Public opinion polls, voting statistics, and the almost disappearance of organized radical groups lead to the inescapable conclusion that there has never been more general satisfaction with the operation of our system than there is today. No major economic group challenges either the political institutions or the property relations of the American society; trade unions accept the basic premises of capitalism, relying on collective bargaining for the achievement of goals which are generally approved by the American people; there is a continuing, widespread belief in the persistence of individual opportunity in the United States.[36] Indeed, "The belief, frequently expressed in this country, that there has been in recent years some sort of a triumph of Soviet propaganda is simply devoid of substance. The fact is that the ideological attraction of Soviet communism

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[34] Acheson, *A Democrat Looks at His Party*, 120 (1955).

[35] Carr, *The House Committee on Un-American Activities*, pp. ix-x (1952).

[36] Nevins, in "The Saturday Review of Literature," February 6, 1954, p. 47.

has declined generally since the mid-thirties." Kennan, *Realities of American Foreign Policy*, 72-75 (1954). Sidney Warren, Associate Professor of History and Political Science, California Western University, in *Security in a Free Society*, "Current History," October, 1955, points out:

> "There never was, nor is there now, any danger in this country of mass susceptibility to Communist blandishment. To believe otherwise is either to credit the Communists with hypnotic persuasive powers or to impugn both the good sense and the democratic integrity of the American people. An attempt has been made by the unscrupulous to enforce conformity of thought by using smears, innuendoes and half truths. The continued emphasis on the dangers of Communism, giving the impression that it has made substantial inroads in this country, only creates a diversion from the real global problems of our time, breeds suspicion among the American people, and impairs our prestige abroad * * *," *Id.*, at 209-210.

In any case, we agree with Judge Learned Hand that "our dangers * * * are not from the outrageous, but from the conforming; not from those who rarely and under the lurid glare of obloquy upset our moral complaisance, or shock us with unaccustomed conduct, but from those, the mass of us, who take their virtues and their tastes, like their shirts and their furniture, from the limited patterns which the market offers." *The Spirit of Liberty*, 34 (1952).

C. The Strength of the American Economy

If any proof were needed that the American society is a healthy and stable one, a few facts of our economic life should suffice. It is almost as well known to the rest of the world as it is to us that we are enjoying high prosperity in most branches of our economy, and have been since 1950.[37]

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[37] *Economic Report of the President*, January 24, 1956, pp. iii, 1-3, 166, 184, 192.

The recession or readjustment at the end of the Korean war, in the winter of 1953-54, was brief, with upward trends in activity promptly resumed, the principal exception having been farm income relative to expenses. However, it should be noted that this was due not to dearth, but to superabundance.[38].

Even more important than indexes of massive economic upsurge is the competence of government to intervene to forestall collapse or distress: the stabilizing contribution of government to the economy has never been so large, varied, and accepted in peacetime. Ours has increasingly become a mixed economy, with private and public springs of production, demand, and consumption. The commitment of the American people to the democratic method is nowhere more in evidence than in their firm belief in the future—that conditions of widespread unemployment, slumping prices and human want will be provided against by the organization of our society, and especially by action of the federal government.[39].

The shattering experiences of the Great Depression of the thirties, followed by World War II, accustomed Americans to the all-important role of government in the operation of our economy, with the emphasis on planning. Since the results exceed even optimistic expectations, and since the fruits of our economy can so readily be compared with the economic instability and resultant demoralizing insecurity evidenced by countries which in the past were on the eve of armed revolutions, or by countries where today Communism holds a certain attraction and wields a certain power, the confidence and trust reposed in the American government and the economic policies of an enlightened

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[38] *Ibid.*, p. 3.

[39] *Ibid.*, p. 1.

capitalism by the people of the United States have an inevitability about them.[40]

D. Appraisal and Summary.

The effect of the "Smith Act prosecutions" has not eliminated even the asserted "threat" to national security found in the *Internal Security Act of 1950*, 64 Stat. 987, 50 U. S. C. 781 ff. Rather, it has made the task of investigative agencies in the field immeasurably harder. In this connection, FBI Director J. Edgar Hoover says:

> "I would like to point out that the task of covering the field of subversion today is more difficult than it has ever been before in the history of this country. *As a result of the prosecutions under the Smith Act,* the Communists and other such groups are resorting to every means possible to prevent detection, going into the underground, holding meetings in out-of-the-way places, avoiding the use of telephones, using couriers for the transmission of messages, and in every way trying to effect their security program." *Report to House Sub-Committee on Appropriations, Depts. of State, Justice and Commerce Appropriations for 1954,* 83d Cong., 1st Sess., February 25, 1953, p. 136." (Emphasis supplied.)

Clearly, therefore, when petitioners are convicted of conspiring to *teach* and *advocate* the overthrow of the government by force and violence, the rule to be applied is the one enunciated by Mr. Justice Brandeis:

> "• • • [N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the

[40] Compare the shaky structure of the Italian economy in 1948. *Final Report on Foreign Aid of House Select Committee on Foreign Aid pursuant to H. Res. 296,* May 1, 1948, p. 171.

processes of education, the remedy to be applied is *more speech, not enforced silence.*" *Whitney* v. *California,* 274 U. S. 357, 371 (concurring). (Emphasis supplied.)

On the basis of our examination of the strength and influence of the Communist Party in the United States, as compared to the strength of this nation's political institutions and the healthiness of its economy, we believe it clear that whatever the danger from the Communist Party may be, it comes not from petitioners' participation in a conspiracy to *teach* and *advocate,* but from "enforced silence." We believe it clear that to reasonable men the evil apprehended was not so imminent from 1950 to 1956 that it might befall before an opportunity for full discussion was had. Not only have we had "time to expose . . . the falsehood and fallacies," we have had time to expose it in the press, on the radio, through television and motion pictures. We have had time to expose it in our schools, in our churches, in our professions, in government, industry, and labor, and Congressional investigating committees have had time for not much else. We stand with Mr. Justice Brandeis: "[T]he remedy to be applied [in these cases] is more speech, not enforced silence," for the strength of our institutions obviates a finding of any "clear and present danger" of an attempt by these petitioners to overthrow the government by force and violence.

CONCLUSION

By reason of the foregoing, we urge that the judgments below be reversed.

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